

1 SPENCER HOSIE (CA Bar No. 101777)
shosie@hosielaw.com
2 DIANE S. RICE (CA Bar No. 118303)
drice@hosielaw.com
3 LYNDSEY C. HEATON (CA Bar No. 262883)
lheaton@hosielaw.com
4 DARRELL R. ATKINSON (CA Bar No. 280564)
datkinson@hosielaw.com
5 HOSIE RICE LLP
6 Transamerica Pyramid, 34th Floor
600 Montgomery Street
7 San Francisco, CA 94111
(415) 247-6000 Tel.
8 (415) 247-6001 Fax

9 *Attorneys for Plaintiff,*
10 *Space Data Corporation*

11 IN THE UNITED STATES DISTRICT COURT
12 FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

13 SPACE DATA CORPORATION,

14 Plaintiff,

15 v.

16 X, ALPHABET INC., and GOOGLE INC.,

17 Defendants.
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Case No.: 5:16-cv-03260-BLF

**PLAINTIFF'S MOTION FOR LEAVE
TO FILE THIRD AMENDED
COMPLAINT**

Judge: Hon. Beth Labson Freeman
Date: July 6, 2017
Time: 9:00 A.M.
Dept.: 3, Fifth Floor

Trial Date: June 3, 2019

NOTICE OF MOTION

Plaintiff Space Data Corporation (“Space Data”) hereby gives notice that on July 6, 2017, at 9:00 a.m., in Courtroom 3, Fifth Floor, of the United States District Court for the Northern District of California, San Jose Division, located at 280 South First Street, San Jose California, a hearing will be held by the Honorable Beth Labson Freeman, United States District Judge, on Space Data’s Motion to For Leave to File Third Amended Complaint in this action.

Space Data’s motion is brought pursuant to Civil L.R. 7-2 and Fed. R. Civ. P. 15. Through this motion Space Data seeks leave to file a Third Amended Complaint (“TAC”) ¹, which adds two recently allowed and soon to issue patents.

MEMORADUM OF POINTS AND AUTHOITIES

I. INTRODUCTION AND STATEMENT OF THE ISSUES TO BE DECIDED

Space Data seeks to add to this case two recently-allowed patents² which have received Issue Notifications from the United States Patent and Trademark Office (“USPTO”) with dates certain for issuance of April 25, 2017 and May 9, 2017. *See* Exs. A and B to Declaration of Spencer Hosie in Support of Space Data’s Motion to Amend (“Hosie Decl.”). Despite the fact that the Claim Construction Hearing is nearly a year away, and despite Space Data’s diligence in notifying Defendants Alphabet Inc. and Google Inc. (collectively “Defendants” or “Google”) of the pending patent applications and Space Data’s intent to add the patents to the case, Google has refused to stipulate to this amendment.

Under the liberal standards for amendment of pleadings under Rule 15, leave to amend (or in the alternative, supplement) should be granted. The identity of the accused products will

¹ Space Data’s Third Amended Complaint draft is attached hereto as Exhibit 1. The Third Amended Complaint draft is unsigned and does not contain Exhibits E and F, which cannot be created until the new patents issue on April 25, 2017 and May 9, 2017. Space Data will add these elements before the TAC is filed, if leave is granted.

² The substantive additions to the Third Amended Complaint are contained in paragraphs 266 to 312 thereto.

1 not expand at all as all infringement claims relate to Google's Project Loon. Defendants can
 2 show no prejudice in allowing Space Data to amend or supplement the complaint to add these
 3 patents. The Claim Construction Hearing is set for March 16, 2018, leaving plenty of time for
 4 patent discovery to be completed, and trial is set for June 3, 2019. Thus, based on the current
 5 stage of this action, Space Data's proposed amendment would not have any effect on the Claim
 6 Construction Hearing and trial schedule.

7 It is efficient and sensible to address these patents together, rather than proceed with
 8 separate actions against Google in this district all relating to the same infringing product. This
 9 amendment will simplify both claim construction, the preparation of claims and defenses for all
 10 parties, and avoid the need for multiple trials before the Court. In view of the foregoing, as
 11 discussed further below, Space Data respectfully seeks leave to amend or supplement its
 12 complaint to add U.S. Patent Nos. 9,632,503 ("the '503 Patent") and 9,643,706 ("the '706
 13 Patent").³

14 **II. STATEMENT OF FACTS**

15 **The Case Thus Far**

16 On June 13, 2016, Space Data filed its complaint in this action based on Google's
 17 infringement of U.S. Patent No. 6,628,941 ("the '941 Patent") and U.S. Patent No. 7,801,522
 18 ("the '522 Patent") as well as for misappropriation of trade secrets and breach of contract. On
 19 September 30, 2016, Space Data filed its First Amended Complaint, which dropped the '522
 20 Patent from the case.

23 ³ Space Data also received a "Notice of Allowance" on April 5, 2017 for an interference patent
 24 (a patent initially filed by Google relating to Project Loon, claims of which have since been
 25 assigned to Space Data by the Patent Trial and Appeal Board ("PTAB")), Patent Application
 26 No. 14/328,331 ("the Interference Patent"). *See* Ex. C to Hosie Decl. Should Space Data
 27 receive an Issue Notification for the Interference Patent before the hearing date on this Motion
 28 for Leave to Amend, Space Data will file a supplemental brief attaching a revised Third
 Amended Complaint to include that patent as well.

1 In the Joint Case Management Statement filed on October 27, 2016, Space Data noted
2 that an interference proceeding was then pending before the PTAB and that, should the PTAB
3 rule in Space Data's favor with respect to the Interference Patent, Space Data would then seek
4 to amend the complaint to add the Interference Patent to the case. At the Initial Case
5 Management Conference on November 3, 2016, patent discovery was stayed in order to allow
6 time for the Interference Patent to issue and to avoid duplication of patent discovery efforts.

7 On December 2, 2016, Google moved to dismiss the First Amended Complaint. At the
8 Further Case Management Conference and Hearing on Google's Motion to Dismiss held on
9 February 16, 2016, Space Data updated the Court on the status of the Interference Patent, noting
10 that the PTAB had ruled in Space Data's favor and that a patent would then issue in the
11 following six to eight months. The Court decided to lift the stay as to patent discovery at that
12 hearing, but noted that: "I'm not excluding your opportunity to amend the pleading to add a
13 patent, because you've made that clear all along." *See* Ex. D to Hosie Decl., February 16, 2017
14 Hearing Tr., 34:1-3.

15 Google's Motion to Dismiss was granted with leave to amend as to the trade secret
16 misappropriation and breach of contract claims on February 16, 2017. Hosie Rice substituted in
17 as Space Data's counsel on March 9, 2017. On April 14, 2017, Space Data served its
18 Disclosure of Asserted Claims and Infringement Contentions, and on April 20, 2017, pursuant
19 to the order on the motion to dismiss, Space Data filed its Second Amended Complaint.

20 Thus, while this case has been pending since June 2016, very little occurred prior to this
21 April. Further, although patent discovery has recently begun, the date for the *Markman* hearing
22 in this matter is not set until March 16, 2018 and trial is not set to begin until June 3, 2019,
23 leaving ample time to allow for the addition of these patents to the case.

24 **The Additional Patents**

25 *Patent Application 15/366,020; U.S. Patent No. 9,632,503*

26 Space Data originally received a Notice of Allowance for the '503 Patent on February 8,
27 2017, and told the Court in the Joint Case Management Statement filed on February 9, 2017
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1 (ECF 58) that it might consider adding that patent to this case. Subsequent to that date, the
2 USPTO issued a Corrected Notice of Allowance for the '503 Patent on March 6, 2017. Space
3 Data received an Issue Notification for the '503 Patent on April 5, 2017, which stated that the
4 patent will issue on April 25, 2017 as Patent No. 9,632,503. Two days later, on April 7, 2017,
5 Space Data emailed Google's counsel regarding the Issue Notification and requested that
6 Google stipulate to Space Data's amendment to add this patent to the case. *See* Ex. E to Hosie
7 Decl. On April 12, 2017, Space Data sent Google a draft of its proposed charging claim for
8 Google's infringement of the '503 Patent in order to allow Google to evaluate whether it would
9 stipulate to Space Data's amendment of the complaint. *See* Ex. F to Hosie Decl.

10 *Patent Application 15/351,438, U.S. Patent No. 9,643,706*

11 Space Data received a Notice of Allowance for the '706 Patent on March 28, 2017. On
12 April 19, 2017, Space Data received an Issue Notification for the '706 Patent, which stated that
13 the patent will issue on May 9, 2017 as Patent No. 9,643,706. On April 23th and April 24th,
14 Space Data communicated with Google's counsel regarding the Issue Notification for the '706
15 Patent and requested that Google stipulate to Space Data's amendment to add this patent to the
16 case. *See* Ex. H to Hosie Decl. By email dated April 24, 2017, Google confirmed that while it
17 would agree to the addition of the '503 Patent to the case, it would not agree to the addition of
18 the '706 Patent or the Interference Patent. *See* Ex. I to Hosie Decl.

19 *The Interference Patent*

20 On December 22, 2016, final judgment was issued with respect to the Interference
21 Patent (Patent Application No. 14/328,331) and prior Google claims were awarded to Space
22 Data. Space Data told Google of its intentions to add the Interference Patent to this case from
23 the very outset, as discussed above. On April 12, 2017, Space Data received a Notice of
24 Allowance regarding the Interference Patent, which provides that all claims of the Interference
25 Patent are allowed to Space Data. Space Data notified Google of the Notice of Allowance two
26 days later, on April 14, 2017. *See* Ex. G to Hosie Decl. Based on prior experience, Space Data
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1 expects that the USPTO will send an Issue Notification providing a date certain for the issuance
2 of the Interference Patent with four to six weeks.

3 **Space Data's Diligence**

4 As detailed above, Space Data has kept both Google and the Court apprised of the status
5 of its pending patent applications and its intentions to add patents to this case from the very
6 beginning. Space Data notified Google of each significant communication received from the
7 USPTO relating to these additional patents and even sent Google a draft of its charging claims
8 for the '503 Patent, in order to allow Google ample opportunity to agree to this amendment.

9 Space Data moves for leave to amend its complaint now, at the earliest point possible
10 after receiving the Issue Notifications from the USPTO with respect to the '503 and '706
11 Patents, in order to avoid any further delay in the resolution of this case. Allowing for the
12 addition of these patents into this case will avoid the need to proceed with multiple trials all
13 relating to the same technology and the same infringing product: Google Loon.

14 **III. ARGUMENT**

15 **a. Legal Standard**

16 Federal Rule of Civil Procedure 15(a) provides that leave to amend a pleading "shall be
17 freely given when justice so requires." The United States Supreme Court, the Ninth Circuit, and
18 this Court have repeatedly reaffirmed that leave to amend is to be granted with "extreme
19 liberality." *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987) (citation
20 omitted); *see, e.g., Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 230 (1962) (leave to
21 amend should be freely given); *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052
22 (9th Cir. 2003) ("Absent prejudice, or a strong showing of any of the remaining *Foman* factors,
23 there exists a *presumption* under Rule 15(a) in favor of granting leave to amend.") (emphasis in
24 original); *United States v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981) (courts should be guided by
25 policy favoring decisions on the merits "rather than on the pleadings or technicalities"); *Cooper*
26 *Development Co. v. Employers Insurance of Wausau*, 765 F. Supp. 1429, 1432 (N.D. Cal. 1991)
27 (courts have been "quite liberal" in granting leave to amend); *Building Service Employees*

1 *Pension Trust v. Horsemen's Quarter Horse Racing Association*, 98 F.R.D. 458, 459 (N.D. Cal.
 2 1983) (same); *see also* Moore, 3-15 *Moore's Federal Practice - Civil* § 15.14 (“A liberal, pro-
 3 amendment ethos dominates the intent and judicial construction of Rule 15(a).”). The primary
 4 factors relied upon by the Supreme Court and the Ninth Circuit in denying a motion for leave to
 5 amend are “bad faith, undue delay, prejudice to the opposing party, and futility of amendment.”
 6 *DCD Programs*, 833 F.2d at 186. None of these factors are present here.

7 Alternatively, pursuant to Federal Rule of Civil Procedure 15(d), the court may “on just
 8 terms” permit a party to supplement its complaint in order to set out “any transaction,
 9 occurrence, or event that happened after the date of the pleading to be supplemented.” Fed. R.
 10 Civ. P. 15(d). “Rule 15(d) permits the filing of a supplemental pleading which introduces a
 11 cause of action not alleged in the original complaint and not in existence when the original
 12 complaint was filed.” *Cabrera v. City of Huntington Park*, 159 F.3d 374, 382 (9th Cir. 1998)
 13 (citation omitted). “The purpose of Rule 15(d) is to promote as complete an adjudication of the
 14 dispute between the parties as possible by allowing the addition of claims which arise after the
 15 initial pleadings are filed.” *William Inglis & Sons Baking Co. v. ITT Cont’l Baking Co.*, 668
 16 F.2d 1014, 1057 (9th Cir. 1982). Supplemental claims should be allowed where they will
 17 “promote the economical and speedy disposition of a controversy.” *Keith v. Volpe*, 858 F.2d
 18 467, 473 (9th Cir. 1988).

19 **b. Space Data Has Good Cause to Amend Its Complaint and Has Diligently**
 20 **Sought Amendment**

21 Good cause exists for the allowance of the Third Amended Complaint as it will save the
 22 parties and the Court from having to proceed through the substantial duplication of efforts that
 23 would result from a second case relating to the additional patents: two rounds of patent
 24 discovery, two rounds of claim construction, two rounds of summary judgment and *two* trials all
 25 with respect to similar issues, related to the same Google Loon product, and the same key
 26 individuals. Such a result does not make sense for the Court or the parties.

27 Space Data’s diligence in seeking amendment is shown by the fact that it moves to
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1 amend its complaint now, so that these patents may be added to the case as soon as they issue –
 2 or shortly thereafter – in order to avoid any undue delay to the Court or the parties. Space Data
 3 has informed the Court and Google of its intention to add patents to this case from the very
 4 beginning. Space Data has updated Google at every key interval concerning the pending patent
 5 applications and has met and conferred with Google multiple times in order to attempt to come
 6 to agreement, rather than engage in wasteful motion practice or the necessitation of a second
 7 Google Loon case filed in this Court. On April 24, 2017, the day this motion was filed,
 8 Defendants informed Space Data that they would not agree. Space Data has made every effort
 9 to move these patents into this case in as streamlined a way as possible and to avoid the
 10 duplication of efforts by the parties and the Court, and has no other choice at this point than to
 11 move to amend.

12 c. **Defendants Cannot Demonstrate Prejudice, Bad Faith, Delay or**
 13 **Futility.**

14 Space Data should be granted leave to amend the complaint under Federal Rule of Civil
 15 Procedure 15 because Google cannot show that the amendment would cause prejudice to
 16 Defendants, is sought in bad faith, creates undue delay, is futile, or that there was repeated
 17 failure to cure deficiencies by amendments previously allowed.

18 ***1. Defendants Will Not Be Prejudiced by the Amendment.***

19 Defendants will suffer no prejudice by allowing Space Data to amend the complaint to
 20 add these patents. Prejudice can result, for example, where the parties are facing a discovery
 21 deadline or trial and the amendment would undermine those upcoming deadlines. *See Zivkovic*
 22 *v. S. Cal. Edison Co.*, 302 F.3d 1080, 1087 (9th Cir. 2002). Courts have consistently held that
 23 there is no prejudice when a party seeks to amend the complaint in the early stages of litigation.
 24 *See DCD Programs*, 833 F.2d at 187-88 (finding abuse of discretion to deny leave to file fourth
 25 amended complaint when the “case is still at the discovery stage”).

26 The Court has set the Claim Construction Hearing for the middle March of 2018, and
 27 trial for June 2019. While patent discovery has just recently begun (on April 14th), there is
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1 ample time in the case schedule to allow for the adding of these additional patents and
 2 supplemental infringement and invalidity contentions (currently due June 12th) by the parties.
 3 As of now, the parties' claim construction briefing is set to be completed on October 20, 2017, a
 4 full five months before the *Markman* hearing date. Surely, if these patents are added to the case
 5 by the beginning of July, there is still significant time to complete claim construction discovery
 6 and allow for claim construction to proceed in March 2018 as scheduled.

7 As these patents can be added without any change to the *Markman* hearing date or the
 8 trial date, and as Defendants have not yet served their Invalidity Contentions, Google cannot
 9 show any prejudice that would result from Space Data's Third Amended Complaint under
 10 Federal Rule of Civil Procedure 15.

11 **2. *Space Data Has Acted in Good Faith in Seeking the Amendment.***

12 Google also cannot show any bad faith on Space Data's part. The Ninth Circuit has
 13 explained that bad faith can be a party's "history of dilatory tactics," proposed amendments
 14 with "doubtful value," or a party's ulterior motive (e.g., adding "causes of action on which
 15 discovery had not been undertaken" in the face of a pending motion for summary judgment or
 16 merely "seeking to prolong the litigation by adding new but baseless legal theories"). *Thornton*
 17 *v. McClatchy Newspapers, Inc.*, 261 F.3d 789, 799 (9th Cir. 2001).

18 None of these types of actions are present here. Rather, Space Data has acted
 19 expeditiously to seek amendment, as explained above. Also, Space Data has brought this
 20 Motion so the case may move forward efficiently, rather than requiring the filing of a separate
 21 action between the same parties on similar issues, related to the same Google Loon product to
 22 proceed before this Court *in seriatim*; Space Data's good faith here is apparent.

23 **3. *The Amendment Will Not Cause Any Delay to the Schedule or Proceedings.***

24
 25 There will be no delay to this case as a result of the amendment, let alone undue delay.
 26 "Undue delay" encompasses two inquiries, first being whether the proposed amendments would
 27 cause an undue delay in the proceedings. *See e.g., Brother Records, Inc. v. Jardine*, 318 F.3d
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1 900, 910-11 (9th Cir. 2003). The second inquiry is whether the party seeking leave to amend
2 unduly delayed in seeking amendment. *See e.g., Caswell v. Calderon*, 363 F.3d 832, 839-40
3 (9th Cir. 2004).

4 With respect to the first inquiry, as discussed above, Space Data's amendment will not
5 delay any of the proceedings and the Court would not have to change any of the key case
6 schedule dates by allowing this amendment. Additionally, judicial economy favors amendment
7 here, since Space Data may have to file yet another complaint against Defendants if this motion
8 to amend is denied. *See United States v. Dang*, 488 F.3d 1135, 1143 (9th Cir. 2007) (affirming
9 an amendment on a complaint based on "[t]he rights of the parties, the ends of justice, and
10 judicial economy."). With respect to the second inquiry, as explained above, Space Data did not
11 delay in seeking to amend the complaint, but rather diligently pursued this request. Space Data
12 notified the Court and Google of its intention to add patents to this case from the outset. Space
13 Data further proposed its amendment to Defendants as soon as it received the Issue Notification
14 for the '503 Patent and Space Data then brought this Motion promptly after its attempts to
15 resolve the issue with Google failed.

16 d. **In the Alternative, Space Data Should Be Allowed to Supplement Its**
17 **Complaint.**

18 Similarly, under Rule 15(d), the Court may allow Space Data to supplement its
19 complaint for any transaction, occurrence or event that happened after the date of the pleading,
20 unless there are reasons for denying leave such as undue delay, bad faith, prejudice, or futility
21 of the amendment. *See Masonite*, 2011 WL 1642518, at *1. As discussed above, Google cannot
22 show there was undue delay, bad faith, or prejudice, and neither can they show any futility.
23 Therefore, absent leave to amend, Space Data should be granted leave to supplement its
24 complaint to add these additional patents.

25 **IV. CONCLUSION**

26 For the foregoing reasons, Space Data respectfully requests leave to amend, or in the
27 alternative, to supplement, its complaint to add the '503 Patent and the '706 Patent and further
28

1 requests that the Court provide that Space Data may file its Third Amended Complaint within
2 five days of the date of the Order granting this Motion. Space Data further requests that if the
3 Interference Patent is issued before the hearing date on this Motion, that Space Data be
4 permitted to add the Interference Patent to the Third Amended Complaint as well.
5

6 Dated: April 24, 2017

Respectfully submitted,

7 /s/ Spencer Hosie

8 SPENCER HOSIE (CA Bar No. 101777)

shosie@hosielaw.com

9 DIANE S. RICE (CA Bar No. 118303)

drice@hosielaw.com

10 LYNDSEY C. HEATON (CA Bar No. 262883)

lheaton@hosielaw.com

11 DARRELL R. ATKINSON (CA Bar No. 280564)

datkinson@hosielaw.com

12 HOSIE RICE LLP

600 Montgomery Street, 34th Floor

13 San Francisco, CA 94111

14 (415) 247-6000 Tel.

15 (415) 247-6001 Fax

16 *Attorneys for Plaintiff*

17 *SPACE DATA CORPORATION*
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